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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Implementation of Sections of )  
the Cable Television Consumer )  
Protection and Competition )  
Act of 1992 )

MM Docket No. 92-266

Rate Regulation )

MEDIA GENERAL REPLY TO CERTAIN COMMENTS  
ON THE THIRD NOTICE OF PROPOSED RULEMAKING

Media General Cable of Fairfax County, Inc. ("Media General") submits this reply to certain of the comments filed in response to the Third Notice of Proposed Rulemaking contained in the Rate Reconsideration order in this proceeding.<sup>1/</sup> As did Media General's earlier comments on the Third Notice of Proposed Rulemaking ("Media General Third Notice Comments"), this pleading focuses primarily on just one of the four issues on which the Commission requested further comment, the tentative proposal that "... cable operators should be required to elect either the benchmark or the

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<sup>1/</sup> Implementation of Rate Regulation Sections of the Cable Television Consumer Protection and Competition Act of 1992, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266 (released August 27, 1993).

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cost-of-service approach for all regulated tiers...." Rate Reconsideration at ¶ 148.

Certain commenting parties continue to repeat a now somewhat tired refrain that they describe as "gaming" the regulatory system:

[I]f a cable operator were permitted to elect the benchmark approach for one service tier and cost-of-service for another, the operator would have an incentive, for example, to retier its services and place all of its low cost and cost free programming on the basic tier to which it would apply the benchmark method of regulation, while moving its most expensive programming to the tier for which it would apply a cost-of-service showing.

Comments of the National Association of Telecommunications Officers and Advisors [et al.] ... in Response to the Third Notice of Proposed Rulemaking, 11. In both the Media General Third Notice Comments (at 2-3), and in an earlier filing in a companion proceeding<sup>2/</sup> we demonstrated that a properly constructed cost-of-service examination of above-benchmark rates for regulated services above the basic tier could include (with minimal, if any, increase in adjudicative costs) an examination of the cost justification of benchmark rates for the basic tier. This, as we, and several other parties commenting on the Third Notice of Proposed Rulemaking observed, would utterly blunt the fears of "gaming" while preserving

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<sup>2/</sup> The same argument was advanced in the Reply Comments filed by Media General in the cost-of-service rulemaking proceeding at pages 9-11.

other socially beneficial consequences of basic rates based on benchmarks with upper-tier rates reflecting the higher costs of service in those tiers. See, e.g., Comments of the National Cable Television Association, Inc., in Response to the Third Further Notice of Proposed Rulemaking, 17; Comments of Joint Parties, 12; Comments of Viacom International, Inc., 17-18.<sup>3/</sup> None of the parties raising the "gaming" specter addresses the simple cure advocated by Media General, though all were participants in the companion proceeding in which Media General first advanced its proposal.<sup>4/</sup>

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<sup>3/</sup> Two other commenting parties invoked a closely allied logic. See Comments of Continental Cablevision, Inc. on the Third Notice of Proposed Rulemaking, 3-5; Comments of Joint Parties [Cable Operators and Associations] on the Third Notice of Proposed Rulemaking, 6.

<sup>4/</sup> An additional commenter, although endorsing the "gaming" argument, conceded that the added administrative costs associated with the Commission's tentative proposal might well outweigh the perceived benefits of that approach. Comments of the Massachusetts Community Antenna Television Commission, 6-7. The Comments of the New York State Commission on Cable Television endorse the Commission's tentative approach without any explanation of why it should be favored. Id., 5-6; the Comments of GTE offer no cogent explanation for that company's support of the Commission's position. Id. at 11 ("cost-of-service is only a backstop for carriers who find that the benchmark rates are not sufficient in their operations."). The Comments on Third Further Notice of Proposed Rulemaking by Austin, Texas [et al.] ... appear to be talking about an entirely different phenomenon in their discussion of "CHERRY PICKING BETWEEN METHODS OF RATE REGULATION." Id. at 12-13.

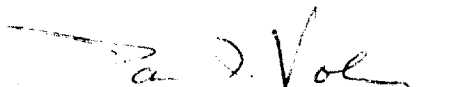
There is a second conclusion that is properly drawn from the Media General proposal, which also responds to a second issue on which the Commission requested comment. If the FCC concludes that the benchmark rates for the basic tier service of a cable system that has litigated the cost of service of an upper tier before the FCC are cost justified, this conclusion should be presumptively valid in any examination of basic tier rates that the local franchising authority thereafter undertakes. That is, if the local franchising authority wishes to undertake an independent investigation of the cost justification of the basic tier of service for a system that has successfully litigated the cost of service of an upper tier, the local authority may proceed only if it presents substantial evidence that the basic tier cost conclusions reached by the FCC are wrong, either as a matter of fact or as a matter of law. Just as the Commission's adjudication of the propriety of benchmark rates in a complaint proceeding are entitled to great deference,<sup>5/</sup> a Commission determination in the course of a upper tier cost-of-service proceeding that benchmark-based basic tier services are cost justified should equally be presumptively binding on local jurisdictions. Among other things, this should mean that, in the unlikely and

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<sup>5/</sup> See, e.g., Comments of the New York State Commission on Cable Television, 5-6.

extraordinary event that a local jurisdiction renders a finding contrary to that of the FCC, that decision should be stayed pending agency review. Unlike the usual circumstance in which eligibility for a stay requires an extraordinary showing<sup>6/</sup> a local franchising authority's determination that the FCC was wrong on a matter the agency has adjudicated is entitled to no deference. Application of the Commission's uniform interpretation of federal guidelines is necessary to prevent varying and conflicting determinations as the Commission has previously recognized.<sup>7/</sup>

Respectfully submitted,

  
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<sup>6/</sup> Rate Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266 (FCC 93-177, released May 3, 1993), 102 n.398.

<sup>7/</sup> Id. at 100-101.